

# COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW WASHINGTON  
WASHINGTON, DC 20004-2401 NEW YORK  
TEL 202.662.6000 SAN FRANCISCO  
FAX 202.662.6291 LONDON  
WWW.COV.COM BRUSSELS

JONATHAN D. BLAKE  
TEL 202.662.5506  
FAX 202.778.5506  
JBLAKE@COV.COM

February 8, 2008

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th St., SW  
Washington, DC 20554

Re: Notice of Ex Parte Communications  
MB Docket No. 07-42

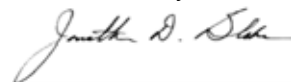
Dear Ms. Dortch:

On February 7, 2008, the undersigned on behalf of the NFL Network met with Catherine Bohigian, Chief of the Office of Strategic Planning and Policy Analysis, and Michelle Carey, Senior Legal Advisor to Chairman Martin, Media Issues, to discuss the program carriage aspect of the Commission's leased access and program carriage proceeding. On February 1, the Commission released its Order in this proceeding.

At the meeting, we discussed the next steps in this proceeding, likely timing considerations and the reasons why action on the issue of streamlining and expediting program access complaints was not included in the Order. We also mentioned the initial arbitration order in the *TCR Sports Broadcasting Holding, L.L.P.* case, copy attached.

Please direct any questions concerning this matter to the undersigned.

Sincerely,



Jonathan D. Blake  
*Counsel to NFL Network*

cc: Catherine Bohigian  
Michelle Carey

1 JEROME J. SUSSMAN, Arbitrator  
2 (State Bar No. 49220)  
3 2001 Wilshire Boulevard  
4 Suite 300  
5 Santa Monica, CA 90403  
6 (310) 453-6200

7 **BEFORE THE COMMERCIAL ARBITRATION TRIBUNAL**  
8 **OF THE AMERICAN ARBITRATION ASSOCIATION**

9 In the Matter of the Arbitration  
10 between

11 **TCR SPORTS BROADCASTING**  
12 **HOLDING, L.L.P.,**

13 Claimant,

14 and

15 **TIME WARNER CABLE, INC.,**

16 Respondent.

AAA CASE NO. 71 472 E 00697 07

**INTERIM AWARD**

17 I, **THE UNDERSIGNED ARBITRATOR**, having been duly designated in accordance with  
18 the "Adelphia Order", as hereinafter defined, and having been duly sworn, and having read the  
19 submissions of the Parties and duly heard the proofs and allegations of the Parties, do hereby  
20 issue this **INTERIM AWARD**, as follows:

21 Pursuant to the Commercial Arbitration Rules of the American Arbitration Association,  
22 a Hearing was held at the offices of Day, Pitney, LLP at One Canterbury Green, Stamford, Conn.  
23 on December 17, 2007 at 9:00 AM before Arbitrator Jerome J. Sussman. Appearing for the  
24 parties were David Frederick, as attorney for Claimant, and Jay Cohen, as attorney for  
25 Respondent. Also present were numerous other executives of TCR Sports and of Time Warner  
26 Cable ("Time Warner") as well as additional lawyers from the firms representing the Claimant and  
27 the Respondent.  
28

1 This arbitration is being held pursuant to the order adopted July 13, 2006 by the Federal  
2 Communications Commission ("FCC") in the "Adelphia Case" (MB Docket No. 05-192) (herein  
3 referred to as the "Adelphia Order"). In that Case, the FCC determined that it would permit  
4 Comcast and Time Warner to acquire certain cable television assets then owned by Adelphia  
5 Cable and that "To constrain Comcast's and Time Warner's ability to unlawfully refuse carriage  
6 to unaffiliated RSNs... an RSN ... denied carriage by Time Warner may submit its carriage claim  
7 to arbitration within 30 days after the denial of carriage...." Time Warner asserts that it did not  
8 "deny carriage" to Claimant within the meaning of this order, that TCR Sports is not an RSN, and  
9 that the claim was not brought within 30 days after the denial of carriage.

10 Both Claimant and Respondent agreed to waive the time limits on this proceeding that  
11 are set forth in the Adelphia Order and Appendices B and C thereto. They also elected to  
12 bifurcate the proceedings so that in the first phase the arbitrator was to determine if there had  
13 been discrimination by TWC against TCR Sports. If there had been such discrimination, the  
14 Parties would proceed to a second phase in which the arbitrator was to determine in a "best offer"  
15 arbitration which of the two Parties carriage offers should be effectuated. Appropriately, such an  
16 arbitration is generally referred to as a "baseball arbitration" because of its use to resolve baseball  
17 salary negotiations.

18 Both Claimant and Respondent were too cute by half in the maneuvering leading up to  
19 this arbitration. That said, I find as follows with respect to these three defenses:

20 1. **"Denial of Carriage"**: In my view, this is the most difficult issue in this proceeding.  
21 Time Warner asserts that because it offered to carry TCR's Mid-Atlantic Sports Network (herein  
22 "MASN") on a digital tier there was no denial of carriage. Such a conclusion would elevate form  
23 over substance in this matter. Granted, carriage on a digital tier would make MASN's  
24 programming available to all those subscribers who can receive the digital signal. However, the  
25 evidence indicates that no more than 50% of Time Warner's subscribers in the affected area  
26 receive a digital tier of service. This means that under the Time Warner proposal, MASN would  
27 be carried to just 50% of Time Warner's potential audience. The evidence clearly indicates that  
28 Time Warner carries its own sports network as well as all or, or virtually all, RSNs in its territory

1 on an analog tier. This would leave MASN as the only RSN that is not available on an analog tier,  
2 and it therefore would be available to only 50% of the potential audience. This is exactly the kind  
3 of discrimination that I think the FCC intended to prevent. Accordingly, **I find that TWC did deny**  
4 **carriage to TCR.**

5         **2. Timeliness:** TWC asks that we hold Claimant to the position it took in a letter dated  
6 April 24, 2007 from David Frederick, counsel for Claimant, to Henk Brands, counsel for Time  
7 Warner, that "Claimant is treating Time Warner's actions as a denial of carriage under applicable  
8 statutes and FCC rules." However Mr. Brands promptly replied that this statement was "incorrect"  
9 and that "TWC was not aware that ... negotiations had reached an impasse or end." Thereafter,  
10 the Parties did negotiate for an additional two weeks through a meeting on May 7, 2007. Since  
11 Time Warner did not treat the negotiations as having ended in April but instead continued to meet  
12 with Claimant, I should not treat the facts differently than the Parties did. **I find that negotiations**  
13 **ended on May 7, 2007 and that TCR Sports filed its claim on June 5, 2007, which is within**  
14 **the 30-day time period.**

15         **3. Is MASN an RSN?** Appendix B to the Adelphia Order sets forth in paragraph A the  
16 following definition:

17         "Regional Sports Network" and "RSN" mean any non-broadcast video programming  
18 service that (1) provides live or same-day distribution within a limited geographic region  
19 of sporting events of a sports team that is a member of Major League Baseball, the  
20 National Basketball Association,... and (2) in any year carries a minimum of either 100  
21 hours of programming that meets the criteria of subheading 1 or 10% of the regular  
22 season games of at least one sports team that meets the criteria of subheading 1."

23 Although TWC disputes the conclusion that MASN qualifies as an RSN, the evidence clearly and  
24 indisputably establishes that MASN provides live distribution within the Mid-Atlantic States of  
25 games of both the Washington Nationals and the Baltimore Orioles, which are both Major League  
26 baseball teams; that it carries all of the games of these teams; that these 300-plus games amount  
27 to significantly more than 100 hours of programming.

28         **Thus, I find that MASN is a "regional sports network" within the meaning of the**

1 **Adelphia Order.**

2 **ADDITIONAL FINDINGS OF FACT.** Based on the evidence presented and the  
3 arguments of the Parties, I make the following additional findings of fact:

4 4. TWC had both motive and opportunity to discriminate against TCR. The motive  
5 comes from TWC's desire to protect and promote its own RSN—News 14 Carolina. While News  
6 14 Carolina is primarily a broadcaster of news, it easily fits within the definition of an RSN set forth  
7 above since it provides live broadcast of 50 games of the Charlotte Bobcats, a National Basketball  
8 Association team, during each of the past two NBA seasons. Other potential motives also exist:  
9 The possibility that News 14—Carolina also wants to acquire added programming for itself  
10 including some or all of the Major League Baseball games now broadcast by MASN which would  
11 likely become available if MASN were squeezed out of business. While there is nothing in the  
12 record to suggest that this is so, the record does show that News 14—Carolina did acquire rights  
13 to the Bobcats broadcasts only after C-SET (Carolinas Sports and Entertainment Television)  
14 failed apparently because it was unable to secure carriage from TWC, the largest cable carrier  
15 in North Carolina. These facts suggest the possibility that TWC is hoping to repeat that scenario  
16 here and scoop up the rights to the Washington Nationals and the Baltimore Orioles if MASN is  
17 put out of business. By virtue of its dominant position in the North Carolina market place, TWC  
18 certainly had the opportunity to discriminate.

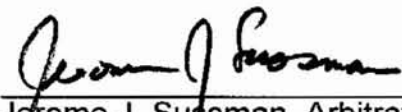
19 5. **It is my conclusion that by failing to offer MASN the possibility of broadcast on**  
20 **an analog tier, while simultaneously distributing its own RSN and all or almost all other**  
21 **RSNs on analog tiers, TWC did discriminate against Claimant.** I agree that TWC is entitled  
22 to substantial level of editorial discretion in determining what channels it will distribute and on what  
23 tiers, but that discretion must be exercised in good faith. Since MASN alone was singled out for  
24 broadcast on a digital tier, that discretion was abused, and I conclude that Time Warner  
25 exercised its discretion here with an intent to discriminate.

26 The conclusion that Time Warner deliberately discriminated against MASN is  
27 inescapable from the documents and testimony before me. It is also buttressed by the fact that  
28 there were never any real negotiations between the Parties over the carriage of MASN by TWC.

1 Had there been an intention on the part of TWC to make an agreement instead of merely  
2 posturing, an executive or attorney for TWC would have phoned or otherwise contacted a  
3 counterpart at MASN to arrange a meeting or conference call to figure out a way to put MASN on  
4 the air after receipt of a request for carriage. Instead, it appears that all of TWC's efforts went into  
5 figuring out ways to avoid putting MASN on the air. Thus, TWC routinely replied to MASN's  
6 requests for carriage by asserting that it was not possible to put MASN on an the much more  
7 widely available analog tier, but that they would be glad to discuss carriage on a digital tier. Such  
8 a digital tier was available to approximately one-half of all TWC subscribers in North Carolina,  
9 which was the area involved. Given the poor results for other RSN's that had been on digital tiers,  
10 neither MASN nor I should have considered that a good faith offer. In the absence of any good  
11 faith offer to put MASN on an analog tier on any terms or in any part of North Carolina at any time,  
12 I must conclude that there were never good faith negotiations between the Parties and that TWC  
13 intended to discriminate against MASN.

14 **6. SECOND PHASE OF THE PROCEEDING.** Since I have determined that TWC  
15 discriminated against TCR Sports, the parties are required to proceed to the second phase of this  
16 arbitration. Counsel will kindly determine their availabilities as well as the availability of any  
17 necessary witnesses so that counsel can have a scheduling conference call with the arbitrator in  
18 the next 10 days.

19 Dated: January 7, 2008

20  
21   
22 Jerome J. Sussman, Arbitrator  
23  
24  
25  
26  
27  
28